No. 85-1625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEARL INVESTMENT COMPANY,
a California partnership,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

In this cause Petitioner seeks a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals holding that *Pullman* abstention is appropriate in virtually any federal action involving land use, a holding, Petitioner submits, that is a subversion of the solemn judgment of the Congress of the United States, and a perversion of the *Pullman* doctrine established by this Court as a narrow exception to the federal court's duty to hear federal cases.

In 1871, Congress determined that persons should have access to federal courts to redress alleged violations of federal rights by actions taken under color of state law. The circum-

stances of that legislative judgment need no restatement here.[1] The Ninth Circuit has, however, by its decision in this cause, effectively amended 42 U.S.C. § 1983 to exclude particular federal rights from provisions of the Act when those rights are involved in land use cases, and that isn't right.

Petitioner has no quarrel with the principles of *Pullman* abstention but submits that the Ninth Circuit's *per se* rule is a far cry from the narrow exception established by this Court where an unresolved question of state law of general applicability is dispositive, or nearly so, of the federal question. In *Pullman,* the constitutionality of the Railroad Commission's order was held to be secondary to the question of whether the Commission was authorized under state law to issue the order in question. Given that the state law question had never been definitively resolved by a state court, this Court abstained. In contrast, neither the authority of the City nor the scope of the City's authority is at issue in this cause. The Petitioner, after a review of California law and, in particular, of two definitive holdings of the California Supreme Court sustaining the City's authority to exercise discretion over building permits and the scope of that authority, has not challenged the City's authority to exercise such discretionary review nor the scope of that authority. Rather, Petitioner on the face of the pleadings alleges that the discretion authorized and validated by California law violates the due process clauses of the United States Constitution because, *inter alia,* the authorized discretion is unfettered by any procedural safeguard or any standard of any kind.

The City's response is to ignore the Complaint by recasting the issues to serve its own needs (in effect suggesting that its Municipal Code provision is unlawful and should be tested again in a California court — a novel affirmative defense) and to argue that times have changed and that the prior California

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[1] *See Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978).

decisions are obsolete because of the passage of time and the ever increasing complexity of modern land use law. To that end, Respondent's Brief is an elaborate exercise of legerdemain designed to give the settled issue before this Court an appearance of complexity and uncertainty. Passing over the absurdity of the City's argument on obsolescence[2] and the fact that only a very few years have passed since the prior decisions, the plain fact is that there is no unsettled question of state law and, indeed, the Ninth Circuit agreed.

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[2] Presumably the City believes that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) are no longer good law because of the passage of time and the increased complexity of our society.

ARGUMENT

In its opinion, the Ninth Circuit Court correctly perceived that the "crux" of Petitioner's civil rights Complaint against Respondent is that the City's Planning Commission "exercised its discretionary review power under constitutionally defective provisions" pursuant to which it arbitrarily imposed relocation and replacement housing conditions. Petition for Writ of Certiorari, App. B at p. B-3. The Ninth Circuit found nothing in Petitioner's Complaint that was novel or of sufficient importance that it ought to be addressed first by a state court. Moreover, the Ninth Circuit concluded that the district court below could have ascertained and applied the applicable California standards for reviewing zoning decisions without deferring to state court adjudication. Petition, App. B at p. B-10.

Respondent's Brief ignores the posture of the abstention issue as defined in the Ninth Circuit's opinion and endeavors instead to create an uncertain state law issue premised upon "changed conditions."[3] Respondent's reasons in opposition to Petitioner's Writ are best summed up in the following language of its brief:

> In light of the changes since 1943—both in society and in the complexity of state and local laws—it can hardly be said that the law in California is settled with respect to the power of discretionary review. Indeed, the scope of that power has yet to be delineated by the California courts. That task is one properly left to the State, first through its own administrative processes and thereafter through its own judicial system.

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[3] Respondent's Brief also sidesteps the fact that Petitioner brought its action under 42 U.S.C. § 1983, an action which this Court repeatedly has held does not require prior exhaustion of administrative or judicial remedies. See *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982); *Williamson County Regional Planning Commission, et al v. Hamilton Bank of Johnson City*, ____ U.S. ____, 105 S.Ct. 3108 (1985).

(Respondent's Brief in Opposition at p. 9) The foregoing language seeks to recast the abstention issue in terms of a challenge to the "power" of the City Planning Commission to exercise its discretion to further general public health, safety and welfare objectives. Unlike the question presented in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), however, Petitioner does not challenge Respondent's "authority" to impose discretionary review,[4] nor does it challenge the "scope" of Respondent's power. What Respondent really is urging is that civil rights actions that somehow involve land use or zoning should be left to the administrative and judicial processes of the State of California, thereby transforming the doctrine of abstention into an exhaustion of remedies requirement — a proposition that not only is erroneous under this Court's prior rulings but also undermines the Congressional purpose in enacting the Civil Rights Act of 1871.

Respondent's Brief incorrectly suggests that *Pullman* abstention is justified merely to further "harmonious relations" between state and federal authority. That is not, however, a sufficient rationale to justify abstention. As Justice Frankfurter, the author of the *Pullman* decision, explained:

> The only reason for declining to entertain the suit is that *it may well be more desirable as a matter of State—Federal relations* for the order of a State agency to be reviewed originally in the State lower court and not to be challenged in the first instance in a federal court. It is not for me to quarrel with the wisdom of such a policy. *But Congress, in the constitutional exercise of its power to define the jurisdiction of the inferior federal courts, has decided otherwise* . . . .

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[4] In its pleadings filed before the Ninth Circuit on the abstention issue, Respondent acknowledged that Petitioner's Complaint does not involve a challenge to the City's authority, or scope of authority, to impose discretionary review, stating: "[Plaintiff] does not allege that the Commission acted outside its scope of authority under the legislation authorizing the exercise of discretionary review . . . ." Excerpt of Record on Appeal, Civil Docket Sheet, Pleading No. 14 at pp. 11-12.

Alabama Public Service Commission v. Southern Railway, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring) (emphasis added). The desire expressed in *Pullman* to avoid "needless friction with state policies" becomes relevant only when a question of general state law is, in fact, unclear. *Hawaii Housing Authority v. Midkiff, et al,* ____ U.S. ____, 104 S.Ct. 2321, 2327 (1984).

Petitioner shares the Respondent's concern about the loss of affordable housing, but that is not the issue in this case. Clothing its argument in such policy concerns does not obscure the fundamental contention of Petitioner's civil rights claim, namely, that conditions were imposed upon it pursuant to a discretionary review provision that on its face and as applied violated Petitioner's federally secured right to due process.

Respondent's Brief further suggests that federal court "intervention" may stifle innovative state efforts to find solutions to complex social problems. That issue is not determinative of the abstention issue raised in the petition before this Court. Petitioner respectfully submits that no local government has a constitutional right to "experiment" with a property owner's federally protected civil rights. Because abstention is the exception, not the rule, *Colorado River Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976), it is not even justified where resolution of the federal question could result in the overturning of state policy. *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n. 5 (1978). Innovative land use controls that are drafted with proper procedural safeguards are more likely to be upheld by the courts than innovative land use controls that are applied through a discretionary review procedure such as Section 26 of the San Francisco Municipal Code—a provision that is devoid of any standards to insure that procedural and

substantive due process is afforded applicants whose building permits are subjected to the City's exercise of discretionary review.[5]

In sum, contrary to the wishful assertions in Respondent's Brief, the Ninth Circuit did not hold that the scope of the City's discretionary review authority, or its right to exercise that authority, is unsettled. Rather, the Ninth Circuit held that the mere fact that the dispute involved land use required abstention because of its prior decisions that the resolution of state law questions is doubtful in "virtually every case involving land use or zoning issues." Therein lies the fatal flaw in the Ninth Circuit's decision that provides a compelling reason for issuance of the Writ. *Pullman* abstention is appropriate where a cause involves the application of an unsettled question of state law of general applicability to a particular set of facts. *Pullman* does not apply to the application of a settled principle of law to an unsettled question of fact — which is the rule that the Ninth Circuit has now established.

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[5] Respondent's Brief also suggests that federal court deference is warranted by virtue of the state courts' greater familiarity with local conditions. This argument is the least compelling of all. The United States Code of Judiciary and Judicial Procedure provides that every federal district court judge must be a resident of the district in which he or she sits. *See* 28 U.S.C. § 134(b). Moreover, the greater the claim that may be made for a state court's special expertise and sensitivity in construing a certain regulatory scheme, the greater the availability—particularly in California—of clarifying legal materials to guide the federal court.

CONCLUSION

For the reasons set forth herein and in its Petition, Petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

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